IN THE

UNITED STATES SUPREME COURT

SUPREME COURT, U.S.
FILED
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No. 09-643

CARL H. BROWN,

PETITIONER,

v.

MARRIOTT INTERNATIONAL

RESPONDENT.

On Petition For Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is there a conflict among the Federal Circuits in their analysis of pretext in discrimination charges?

Conflict exists among the Federal Circuits in the application of the second part, the "Pretext," analysis of the McDonnell Douglas Burden Shifting test.

The Seventh Circuit in *EEOC v. Target Corp*, ruled that employers cannot simply rely on bald statement that one applicant was better than another, or that an employee did not meet subjective expectations, to justify their decisions against a discrimination charge. *E.E.O.C. v. Target Corp.*, 460 F.3d. 946 (7th Cir. 2006). The Fifth and Eleventh Circuit held that the employer must clearly explain the reason for not hiring. *Patrick v. Ridge*, 394 F.3d 311, 317 (5th Cir. 2004); *Chapman v. AI Transport*, 229 F.3d 1012 (11th Cir. 2000).

The Fourth Circuit, in the present case has ruled that bald statements that one candidate did not meet subjective expectations can be relied upon to satisfy the requirement of Summary Judgment in a discrimination charge despite having given inconsistent and varying explanations for their refusal to hire.

2. Did the Fourth Circuit require a showing of

pretext greater and more onerous than that required under *Burdine*? *Texas Dep' t of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

3. Did the Fourth Circuit err by failing to consider the *prima facie* evidence and the comparative evidence of the hired candidate in the pretext analysis?

This Court stated in *Burdine* and reiterated in *Patterson* that Plaintiff' s *prima facie* evidence of discrimination is to be considered again for the pretext analysis, and further, that a comparison of the candidate that was eventually hired is probative of pretext. The Fourth Circuit in the present case not only ignored the *prima facie* evidence in the pretext analysis, but also ignored the comparative evidence of the candidate defendant eventually hired. The Fourth Circuit limited the inquiry in its analysis to only evidence relating to the two phone interviews.

The questions presented satisfies the Court's Rule 10(a) criteria for granting certiorari. The questions are of national significance as the majority of corporations engage a variety of screening tactics that when left unchecked or when not required to pass the formal rigors of the pretext analysis, a great danger exists that the Fourth Circuit's decision will provide a blue print for unscrupulous employers to engage

discriminatory practices without fear of recourse.

PARTIES TO THE PROCEEDING

Petitioner, Carl Brown is an individual domiciled in the State of Maryland.

Respondent, Marriott International, Inc.. ("Marriott") is a legal entity registered in the State of Maryland.

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BASIS FOR JURISDICTION AND OPINIONS BELOW

Carl Brown filed suit against Marriott International, Inc. ("Marriott"), alleging Marriott violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e *et. seq.*, and Civil Rights Act of 1991, 42 U.S.C. 1981 by discriminating against Brown on the basis of his race and color, because he is Black, African American.

The District Court granted Marriott' s Motion for Summary Judgment and Carl Brown is appealing the District Court' s order granting the Motion for Summary Judgment. Jurisdiction in the District Court was based on 28 U.S.C. Secs. 1331 and 1343. Jurisdiction in the United States Court of Appeals for the Fourth Circuit was appropriate pursuant to 28 U.S.C. Sec. 1291.

The United States District Court for the District of Maryland, Greenbelt, entered final on October 31st, 2008, and Mr. Brown filed a timely Notice of Appeal to Fourth Circuit Court on November 25, 2008. App. 6.

On August 3, 2009, the Fourth Circuit filed a *per curiam* opinion affirming the District Court' s ruling. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). App. 2.

On October 30th, 2009, the Chief Justice of this Court, extended the time to file the petition for

writ of certiorari to and including December 1, 2009.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Secs. 2000e *et. seq.*, and Civil Rights Act of 1991, 42 U.S.C. 1981 are involved, and Federal Rules of Civil Procedure, Rule 56 Summary Judgment.

STATEMENT OF THE CASE

On or about March 8, 2005, Defendant Marriott advertised an open position in the Washington Post for a "COBOL Production Support Manager." Judith Fried directed this posting as she was the hiring manager who completed an Assignment Statement dated August 6, 2004. This Assignment Statement stated the "Technical qualifications and education required" for the Production Support Manager as:

> Technical Skills/Computer Required: Analysis Design: Structured Programming, Operating Systems: OS390, Languages COBOL/COBOLII, DB2 with embedded SQL.

This is the basis for the advertisement that was posted by Brenda Mitchell, the staffing assistant. On or about March 15, 2005,

Plaintiff, Carl Brown, applied for the position. Judith Fried, hiring director, reviewed Plaintiff's resume and deemed him "qualified" and instructed Brenda Mitchell, hiring assistant, to schedule an interview. On or about March 21, 2005, Mitchell scheduled Plaintiff to have a phone interview with Judith Fried. On or about March 24, 2005, Fried conducted the phone interview of Mr. Brown where Mr. Brown informed Ms. Fried that he is a member of the State of Maryland Minority Business Enterprises. Fried noted this fact on Mr. Brown's resume by a hand written note "State of Md., DOT-Min. bus. Ent." After learning that Mr. Brown is part of the Minority Business Enterprises, Fried concluded that Mr. Brown is a black, African American male and abruptly told Mr. Brown that the job requirements had changed and abruptly ended the interview.

Mr. Brown e-mailed Ms. Fried on March 25, 2005 requesting Fried or a staff member "reply with three major duties of this COBOL Production Manager and duties of his/her staff " in order to get clarification of the job requirements. Not getting a response, Mr. Brown called Ms. Mitchell asking if the position requirements had indeed changed. Mitchell responded by saying the position requirements had not changed. On April 1, 2005, Mr. Brown wrote to Ms. Fried requesting to stay in touch because as Mitchell had confirmed that the position had not changed, Brown believed he was a proper fit. This letter

again reiterated Plaintiff's involvement with Minority Business Enterprise. Brown specifically memorializes the phone conversation where Fried had told Brown that the requirements had changed. Ms. Fried gave no response to Mr. Brown's April 1, 2005 letter. Further, the e-mail between Mitchell and Fried dated April 5, 2005, discussed how to address Brown's repeated correspondence. Ms. Mitchell suggested to Ms. Fried that they conduct an in person interview of Brown, given Brown's "persistence and seem[ingly] well-prepared e-mails." Fried instructed Mitchell to perform a meaningless standard interview so the "decision is not resting solely with me to move forward or not," even though Fried and Mitchell were both aware that Mitchell had no hiring authority. On or about April 7, 2005, Ms. Mitchell conducted the meaningless phone interview with Brown, knowing full well that she had no hiring authority and that Fried had already decided against hiring Brown. Mitchell's own notes regarding Mr. Brown indicated his strengths as a manager and further states "good fit w/ our pos. Our priorities all his careers. (Judy)". Nothing in Mitchell's notes evidenced poor communication by Mr. Brown.

On April 19th, 2005, Mitchell informed Brown via e-mail that he "[doesn't] meet the qualifications for a manager position at Marriott…missing the financial component in your background," with no mention of Mr. Brown's

poor verbal communication skills or that he didn't clearly answer questions as the basis for ending his consideration for the position.

On the same day Mitchell informed Brown he is no longer being considered for the position, Marriott posted yet another advertisement on the Washington Post, this time altering the heading of the position to "Production Support Manager", deliberately dropping "COBOL" from the heading. Marriott acknowledged that the April 19, 2005 posting and the March 8, 2005 posting refer to the same job.

On or about May 5, 2005, Marriott hired a white candidate, Richard Miller to fill the position. Marriott afforded Richard Miller preferential treatment, giving him no less than two face-to-face interviews despite Fried's acknowledged shortcoming that he lacked the qualifications. Fried realized in just two months that Miller was not the appropriate person for the job failing to accomplish expectations. Subsequently, Marriott sought yet another white candidate, Gaetan Bedard, who lived in Boston Massachusetts, finding his resume on a commercial job searching site.

Defendant then engaged in what is truly shocking conduct by making Mr. Bedard an unwitting participant in their conspiracy to cover up their discriminatory practice by having Bedard falsify his resume to indicate "expertise and knowledge" in structured programming, specifically COBOL and SQL even though Mr. Bedard

admittedly has only basic understanding of COBOL and SQL. Defendant hired Gaetan Bedard on December 5, 2005 for the position that Brown had sought. On July 5, 2005, Marriott bifurcated the position and placed an ad for "COBOL Production Support" to supplement the technical shortcomings of Bedard.

On October 6, 2005, Brown filed a complaint with the Maryland EEOC. Throughout the EEOC process, Marriott only disclosed Bedard's first resume. Brown filed suit in Circuit Court of Maryland for Montgomery County on February 27, 2007 and subsequently filed an Amended Complaint on May 8th, 2007. During discovery, Marriott revealed Bedard's second resume and claimed that Bedard did have COBOL, SQL, DB2, and structured programming expertise. At depositions, Bedard himself admitted that he did not have COBOL, SQL and DB2 expertise and admitted that Marriott had him falsify his qualifications on his second resume.

REASONS FOR GRANTING THE WRIT

1. A Conflict Exists Among Federal Circuits in the Methodology and Standard of the Pretext Analysis.

Conflicts exist among the Federal Circuits in the application of the second part, the "Pretext," analysis of the *McDonnell Douglas* Burden Shifting test. The Seventh Circuit in *EEOC v. Target*

Corp, ruled that employers cannot simply rely on bald statement that one applicant was better than another, or that an employee did not meet subjective expectations, to justify their decisions against a discrimination charge. 460 F. 3d. 946 (7th Cir. 2006). The Fifth and Eleventh Circuit held that the employer must clearly explain the reason for not hiring. *Patrick v. Ridge*, 394 F. 3d 311, 317 (5th Cir. 2004); *Chapman v. AI Transport*, 229 F. 3d 1012 (11th Cir. 2000).

The Fourth Circuit, in the present case has ruled that bald statements that one candidate did not meet subjective expectations can be relied upon to satisfy the requirement of Summary Judgment in a discrimination charge despite having given inconsistent and varying explanations for their refusal to hire. Marriott, in the present case provided four different explanations at four different instances: 1. He was not a good match because job qualifications had changed; 2. Missing financial component; 3. Not as qualified as others; and 4. Poor communication skills.

Under *Holland v. Washington Homes Inc.*, 487 F. 3d. 208, 214 (4th Cir. 2008), inconsistent answers given for discriminatory purpose support a finding of pretext. Defendant' s explanations given for ending Brown' s consideration for the COBOL Production Support Manager have been inconsistent, shifting, ambiguous, and thus suspect of pretext. Defendant has provided four different reasons on four different occasions.

During the phone interview, once Fried logically deducted that Mr. Brown was African American when Brown informed her that he was part of the minority business enterprises, she quickly informed Mr. Brown that the job requirements had changed and that he was not a "match" for the position.

Mr. Brown's e-mail to Fried and to Mitchell asking if the position had indeed been changed corroborates the fact that Fried deliberately misinformed Brown about the position responsibilities to brush off Mr. Brown. No e-mail response from Fried exists where she denies telling Mr. Brown that the position requirements had changed.

Brenda Mitchell on April 19, 2005, informed Mr. Brown with yet another ambiguous and inconsistent reason that he was "missing the financial component in his background." The day Marriott informed Mr. Brown he will not be hired, Defendant suspiciously posted another advertisement in the Washington Post, this time deliberately eliminating "COBOL" from the heading and altering order listing for COBOL, placing it behind JAVA/J2EE, Websphere.

After Plaintiff filed his charge for discrimination, Defendant cites in their position statement that Brown failed to answer questions directly and base their decision not to hire him on his "poor communication skills." However, the contemporaneous evidence, specifically Mitchell' s notes taken during the interview,

makes no such observation about Brown's poor communication skills.

Marriott's position statement to the EEOC admits that Mr. Brown informed them that "he had 'maintained contracts budgets for resources and materials" on various contracts." When Mr. Brown challenged the assertion that he did have adequate financial component(s) Marriott attempted to dispose of Brown's explanation by giving a bald statement answer that he was not as "competitive as other candidates" with no specifics on who the other candidates were and how he was less competitive.

In reality, Marriott had such a dearth of qualified applicants at the time that Marriott hired Richard Miller, a candidate that was hired only on a temporary basis because of his obvious qualification deficiencies. Marriott's shifting, ambiguous and inconsistent explanations supports a finding of pretext. *Holland*, 487 F. 3d at 214 (4th Cir. 2008). Judge Williams improperly took the inconsistent reasons given by Marriott as "several reasons" and further went on to speculate on Marriott's actual reason for not hiring Brown as his "poor communication skills".

First, the District Court should not be speculating to ascertain Marriott' s actual reason, and by doing so Judge Williams viewed evidence and made inferences in light most favorable of the moving party. F.R.C.P. 56.

This violated Rule 56 where all facts and inferences must be viewed in the light most favorable to the non-moving party, in this case Brown. Certainly, the evidence above forecasts by a preponderance of the evidence that Brown was qualified and did have contract, budgeting and the requisite financial component as well as the requisite managerial experience.

Mitchell further wrote in her notes that Brown was qualified and seemed like a "good fit". So if the reason was indeed Brown's poor communication skills, why on Earth would Fried inform Brown the job qualifications had changed and even change the Washington Post advertisement to corroborate her lie to Mr. Brown? Most importantly, Marriott earlier claimed that Mr. Brown lacked the qualifications and that he was less competitive. Yet, the candidate they hired, Gaetan Bedard, lacked completely, the COBOL and Programming skills which the job announcement stated as the most important and required skill.

The Fourth Circuit's ruling in the present case is inconsistent with the rulings of the Fifth, Seventh, and Eleventh Circuits, and is further inconsistent with the Fourth Circuit's own directive under *Holland*. The Fourth Circuit should follow the rulings of the other Federal Circuits and require more than bald statements as explanations, and require employers like Marriott, to provide clear, unambiguous, and

unshifting explanation for not hiring a candidate. Because Marriott provided only bald and shifting statements, the Fourth Circuit erred by granting Defendant Summary Judgment.

2. The Fourth Circuit Required a Showing Of Pretext Greater And More Onerous Than the Preponderance Of the Evidence As Required Under *Burdine.*

The Supreme Court has invoked *McDonnell Douglas* criteria in both unlawful discharge and failure to hire cases. *Texas Dep' t. of Community Affairs v. Burdin*, 450 U.S. 248 (1981). This Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and the Court of Appeals in *Runnebaum v. Nationsbank of Maryland*, N.A., 95 F.3d 1285 (C.A. 4 (MD 1996) held that a plaintiff is not required to show pretext by any specific type of evidence "because an employer's true motive for firing an employee may be difficult to determine." *Id.* In 2000, this Court resolved a split amongst the Federal Circuits in *Reeves v. Sanderson Plumbing Products, Inc.*, by ruling that a discrimination plaintiff survives motion for judgment as a matter of law if he submits (i) evidence supporting a *prima facie* case; and (ii) evidence from which a rational fact finder could conclude that the employer's proffered explanation for its action was false. 530 U.S. 133 (2000).

The Fourth Circuit's ruling in the present case is an extension of their ruling in *Price v. Thompson*, where it held that mere inconsistent reasons are not tantamount to unlawful discrimination and claimed that it applied the *Reeves* methodology but stated that for the Plaintiff to survive Summary Judgment, the Plaintiff must show both a "strong prima facie case and a strong showing of pretext." *Price v. Thompson*, 380 F.3d. 209, 215. (4th Cir. 2004). In distinguishing the Plaintiff's case in *Price*, to a Plaintiff that would survive summary judgment, the Fourth Circuit then alluded to their decision ins *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846 (4th Cir. 2001), where the Fourth Circuit emphasized the Plaintiff in *Sears* presented "uncontroverted evidence". In other words, the Fourth Circuit has continuously required evidence greater than by preponderance of the evidence in showing pretext to survive summary judgment - a "strong" or "uncontroverted evidence" standard that is contrary to the other jurisdictions and to the this Court's ruling in *Burdine*, which set the standard to preponderance, not something more "onerous". *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

In the present case, the District Court declared that Mr. Brown did establish a *prima facie* case of discrimination in the first part of

the burden shifting analysis.[1] Brown is an African American, Black male, a protected class under Title VII and under 42 U.S.C. 1981 and thus satisfies the first part of the test. Plaintiff applied for the position advertised in the Washington Post for a COBOL Production Support Manager on March 8, 2005. Mr. Brown was clearly qualified for the position as his credentials matched the required skills of the posted position in terms of COBOL, OS390, DB2, SQL. Brown had expertise in the required skills in COBOL, COBOLII, DB2, SQL and structured programming skills, and past jobs further evidence his qualifications as he had been a project manager and line manager utilizing COBOL, DB2, OS390, and SQL, on structured programming on IBM main frames for James Martin Government Contracting and IBM, dating back to 1970. Fried even testified that "based on [his] resume, I would have considered this person to be, you know, looked like they have the experience that I was looking for...." Despite Plaintiff's qualifications, Marriott refused to hire Brown without even a face to face interview. Thus, parts two and three of the test were

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[1] Briefly, the first stage of establishing the *prima facie* case by Plaintiff requires: (i) the plaintiff is a member of the protected class; (ii) the plaintiff applied and was qualified for the job; (iii) the application was rejected; and (iv) the position remained open after the rejection. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 502 (1993); *McDonnell Douglass Corp. v. Green*, 411 U.S. 792 (1973).

satisfied. After refusing to hire Brown, the position remained vacant until Richard Miller was hired on a temporary basis until Gaetan Bedard was hired. The COBOL and programming component of the position still remained open because Marriott had bifurcated the subject position into one of Management and one of COBOL Technical Support. Thus, the *prima facie* case was established and properly acknowledged by the District Court. The District Court then declared that Marriott met its burden of persuasion accepting and even speculating on Marriott's reason that Brown had "poor communication skills". However, Judge Williams then improperly concluded that Brown failed to provide any evidence of pretext when in fact Brown forecasted abundant evidence of pretext sufficient to prove by preponderance of the evidence that Marriott's action was pretextual. Not only did Brown provide rebuttal evidence to Marriott's shifting and inconsistent reasons, Brown provided overwhelming circumstantial evidence that Marriott's decision was pretextual.

The Fourth Circuit simply ignored this slew of presented evidence, even failing to explain how it was not relevant or why it should not be considered. The Fourth Circuit only looked at evidence related to the two interviews and simply ignored the rest. This body of direct and circumstantial evidence of pretext should easily satisfy the preponderance of the evidence standard.

Brown	Marriott
Only Telephone Interview No Face to Face	Spoke Around things.
Inferred Brown was Black Male	Missing financial component.
Noted Member of Minority Bus. Enterprises	Not competitive
Told Qualifications had changed.	Missing financial component
Mitchell's notes Brown qualified "good fit"	Weak managerial experience
Brown has managerial and financial bkg.	
Fried Admits Brown Qualified	
Marriott drops "COBOL" from 2nd advertisement.	
Marriott hires unqualified white candidate	
Marriott fires unqualified white candidate	Miller let go in about 2 months.
Marriott has Bedard falsify his resume.	
Marriott Hires Bedard.	
Marriott hides falsified resume in EEO proc.	

Marriott discloses falsified resume in District Court to claim Bedard was qualified.	
Def. argues Bedard has DB2, COBOL, SQL Skills using falsified resume.	
Deposition - Bedard admits he does not have the DB2, COBOL, SQL skills as claimed in the falsified resume. Marriott shifits emphasis for not hiring Brown to his communication skills.	
Marriott bifurcates position to create another position requiring DB2, COBOL, SQL without the management requirements.	

This table of evidence shows that Brown proffered greater weight of evidence than Marriott, which should easily satisfy the preponderance standard for establishing pretext. The Fourth Circuit remains the sole Circuit that imposes greater than preponderance of the evidence standard upon plaintiffs despite this Court's ruling that pretext need only be shown by a preponderance.

3. The Fourth Circuit Erred By Failing to Consider the *Prima Facie* evidence and the Comparative Evidence of the Hired Candidate in the Pretext Analysis.

This Court stated in *Burdine* and reiterated in *Patterson* that Plaintiff' s *prima facie* evidence of discrimination is to be considered again for the pretext analysis, and further, that a comparison of the candidate that was eventually hired is probative of pretext. The Fourth Circuit in the present case not only ignored the *prima facie* evidence in the pretext analysis, but also ignored the comparative evidence of the candidate defendant eventually hired. *Patterson v. McClean Credit Union,* 491 U.S. 164 (1989); *Texas Dep' t. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

Marriott had Gaetan Bedard falsify credentials on his resume to indicate he had expertise in COBOL and structured programming to give the false appearance that Marriott hired the better qualified candidate, when in fact Bedard did not have any expertise much less a novice understanding of COBOL and structured programming. His first resume submitted to Marriott had no mention of expertise to COBOL, SQL, DB2 and structured programming. Marriott deliberately had Bedard modify his resume to falsify qualifications that he did not possess.

Q. Was there any other resume that you sent to Marriott aside from the Brass Ring one?

A. Yeah. After I was contacted by Rex Maghan….

Q. What sort of information did you obtain from Marriott to provide the second resume?

A. It was details about the responsibilities of the job.

Q. What sort of responsibilities did they tell you?

A. That it was a production support position and that the technology that, you know, the position would be responsible for had IBM mainframes, IBM UNIX environment, DB2, and the development tolls that they used.

Q. Did [Marriott] ask you to provide another resume?

A. Yes.

Q. With the additional responsibilities that they had specified?

A. Yeah.

Marriott told Bedard that the position would be responsible for IBM mainframes, IBM Unix, DB2 development, skills Bedard lacked while Brown had nearly 30 years of experience supporting and managing DB2 and IBM mainframes. Bedard had no expertise in COBOL, SQL, DB2. In fact, Bedard could not answer a single basic questions pertaining to structured programming during

depositions.

Q. I' m going to ask you some technical questions and if you could - this is testing your working knowledge of these things. So without reference to any document could you name the divisions in a COBOL program?

A. No.

Q. What are the different types - different data types available in COBOL?

A. No.

Q. You don' t know the different data types available in COBOL?

A. Not off the top of my head.

Q. What is the purpose of a select statement?

A. It has to do with access to data sites within a data base.

Q. And what does Select define?

A. I don' t know.

Q. Explain the function of two SQL statements?

A. I don' t understand the question.

Q. Could you tell me a function with respect to COBOL?

A. No.

Q. Is it fair to say that your level of understanding COBOL is very rudimentary?

A. I think that would be fair to say.

Q. So let me ask you, how do you rate yourself in terms of your

knowledge of COBOL running from the scale of a novice to expert?

A. At this point, probably novice.

Thus, Marriott hired a white candidate who lacked the skills clearly marked as required in the job posting while it refused to hire Mr. Brown who had the required skill set but did not possess the unmentioned and subjective skills that Marriott supposedly wanted but did not list as required in the job posting. The Fourth Circuit simply ignored this comparative evidence of disparity of the two candidates, failing to utterly even analyze much less explain how comparative evidence was not relevant nor probative of pretext in the case. The Fourth Circuit also ignored the comparative treatment of candidates who applied for this particular position. White candidates, Miller and Bedard, were given face to face interviews, and flown from out of state even though they lacked the two most important and required skills. No minority or African American candidates were given such treatment. Marriott responds by claiming it promoted an African American male to a supervisory position, but it was not this particular position and thus irrelevant. For the position in question, Marriott gave preferential treatment and sought out specifically white candidates. This fact of disparate treatment of candidates should have been considered.

What is more shocking is that during the EEOC's investigative process, Marriott concealed this second falsified resume. Then, during discovery in the District Court case, Marriott decided to produce this document to strategically argue that Bedard was better qualified, claiming Bedard did in fact have COBOL, SQL, DB2, and structured programming expertise. This is yet another example of Marriott's inconsistent and shifting explanation. Therefore, the second resume and the evidence of falsified qualifications and the comparative evidence of the hired candidate, Bedard, and the preferential treatment of white candidates in the application process must be considered as evidence of pretext, which the Fourth Circuit improperly ignored.

4. Summary Reversal May Be Warranted.

The Fourth Circuit's decision in the present case is clearly inconsistent with the rulings of this Court and the rulings of the Fifth, Seventh, and Eleventh Circuits. The Fourth Circuit's acceptance of the District Court's bald explanation for granting summary judgment without so much as even hinting at why it ignored the evidence of the falsified resume or why the comparative evidence of the unqualified white candidate that was hired is not relevant or probative of pretext creates a dangerous precedent and blue print for unscrupulous employers to discriminate without fear of

recourse in the Fourth Circuit. The Fourth Circuit's ruling from *Sears* to *Price* and now in the present case have strayed so far from the proper pretext analysis, summary reversal may be warranted.

CONCLUSION

The Fourth Circuit erred in affirming the District Court' s grant of Summary Judgment in favor of Marriott. The decision should be reversed, and the matter remanded to the District Court for an evidentiary hearing. In the very least, the Fourth Circuit and the District Court should be required to perform a thorough pretext analysis where it not only considers evidence to a standard of preponderance but considers the comparative and *prima facie* evidence in the pretext analysis.

Respectfully submitted,
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By: _____

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-2347
CARL H. BROWN,
Plaintiff - Appellant,
v.
MARRIOTT INTERNATIONAL, INCORPORATED,
Defendant - Appellee.
Appeal from the United States District Court for the District of
Maryland, at Greenbelt. Alexander Williams, Jr., District
Judge. (8:07-cv-01585-AW)
Submitted: July 30, 2009 Decided: August 3, 2009
Before MOTZ, KING, and DUNCAN, Circuit Judges.
Affirmed by unpublished per curiam opinion.
Francis H. Koh, KOH LAW FIRM, LLC., Bethesda, Maryland, for
Appellant. Thomas L. McCally, Kelly M. Lippincott, CARR
MALONEY, PC, Washington, D.C., for Appellee.
Unpublished opinions are not binding precedent in this circuit.
Case: 08-2347 Document: 25 Date Filed: 08/03/2009 Page: 1 Case 8:07-cv-01585-AW Document 28-2 Filed 08/03/2009 Page 1 of 4
PER CURIAM:
Carl H. Brown, an African-American male, appeals from
the district court's order granting summary judgment in favor of

Marriott International, Inc. ("Marriott") and dismissing his employment discrimination action alleging violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § § 2000e to 2000e-17 (2006) ("Title VII"). Brown alleged that Marriott unlawfully discriminated against him on the basis of race when he was not hired to a position as a production support manager.

Our review of the record and the district court's opinion discloses that this appeal is without merit. The familiar burden-shifting scheme set forth by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies to Brown' s claims. We find the district court properly determined that, even assuming that Brown established a prima facie case of discrimination, he failed to establish pretext for Marriott' s legitimate, nondiscriminatory reasons for failing to hire Brown for the position at issue. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981); Conkwright v.

Westinghouse Elec. Corp., 933 F.2d 231, 234-35 (4th Cir. 1991).

Specifically, the record evidence is consistent that, after two telephone interviews and a number of email correspondences, Marriott chose not to select Brown because of his poor verbal

and written communication skills. While Brown contends that Marriott gave inconsistent reasons for not hiring him, which support a finding of pretext, the district court correctly determined that the evidence established conclusively that concerns regarding Brown's communication skills began with his first telephone interview and continued throughout the remainder of the interview process, that Marriott had several reasons for not hiring him, and that they communicated the most palpable reason to him. That Marriott chose to provide Brown with an alternate reason for not hiring him does not establish pretext, as found by the district court.

We find that there is no evidence that those who chose
not to select Brown were motivated by any desire other than to
select the candidate they felt was the best suited for the
position. See Evans v. Technologies Applications & Serv., Co.,
80 F.3d 954, 960 (4th Cir. 1996) (citing Burdine, 450 U.S. at
258-59). Because Brown failed to establish pretext, we find
that the district court did not improvidently grant summary
judgment to Marriott.
Accordingly, we affirm the district court's order
granting Marriott's motion for summary judgment. We dispense
with oral argument because the facts and legal contentions are
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adequately presented in the materials before the court and
argument would not aid the decisional process.
AFFIRMED

Case: 08-2347 Document: 25 Date Filed: 08/03/2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DISTRICT

CARL H. BROWN *
*
Plaintiff, *
*
v. * Civil Action No. AW-07-1585
*
MARRIOTT INTERNATIONAL, INC. *
Defendant.

** * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DISTRICT

CARL H. BROWN *
*
Plaintiff, *
*
v. * Civil Action No. AW-07-1585
*
MARRIOTT INTERNATIONAL, INC. *
*
Defendant. *
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* *
*

MEMORANDUM OPINION

Plaintiff, Carl H. Brown, ("Plaintiff" or "Brown") instituted this employment discrimination action against Defendant, Marriott International, Inc. ("Defendant" or "Marriott"), alleging disparate treatment based on race in violation of 42 U.S.C. § 2000e *et seq* ("Title VII") and 42 U.S.C. § 1981 ("Section 1981"). Presently pending is Defendant' s Motion for Summary Judgment. The motion has been fully briefed, and the Court now rules pursuant to Local Rule 105.6, no hearing being deemed necessary. For the reasons that follow, Defendant' s
Motion for Summary Judgment is granted.

I. Background

A. Factual Background

The following facts are taken in the light most favorable to the Plaintiff. On or about March 8, 2005, Marriott advertised an opening for a "COBOL Production Support Manager" in the Washington Post. Marriott's Staffing Manager, Brenda Mitchell, created the posting based on input from Judith Fried, Marriott's hiring manager. The job posting indicated that applicants

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must have a background in COBOL, QS390, DB2 and SQL. UNIX, WINDOWS NT, IMS, PL/SQL, JAVA and XML were additional desired qualifications. (Paper No. 21 Ex. 1) On March 15, 2005, Brown decided to apply for the position and submitted his resume. On March 24, 2005, Judith Fried interviewed Brown over the phone. During the phone interview, Ms. Fried asked Brown about his technical experience and background. In response, among other things, Brown told Ms. Fried that he was a minority business enterprise owner and referred her to the Maryland Department of Transportation's website for verification. At the conclusion of the phone interview, Ms. Fried told Brown that he was not a fit for the position and that the job requirements had changed. (Paper No. 21 Ex. 8) On March 25, 2005, Brown sent an e-mail to Ms. Fried. (Paper No. 21 Ex. 9) Brown

said that although he was no longer being considered for the position; he was not disappointed, because "as a former hiring manager, [he] realize[d] that [Ms. Fried] must be comfortable with [her] staff." (*Id.*) On April 1, 2005, Brown sent another e-mail to Ms. Fried. He asked if he could keep in touch with her, because he was "convinced that [Marriott's] COBOL Production Manager position [was] a proper fit . . . ." (Paper No. 21 Ex. 10) On April 4, 2005, Brown was told again, via e-mail by Ms. Mitchell, that Marriott would be pursuing other candidates for the position." (Paper No. 19 Ex. 8) On or before April 5, 2005, Ms. Mitchell and Ms. Fried discussed how to address Brown's repeated e-mails. (Paper No. 21 Ex. 11) Ms. Mitchell suggested to Ms. Fried that they conduct an in person interview of Brown, given Brown's "persistence and seem[ingly] well-prepared e-mails." Ms. Mitchell also indicated, however, that she did not "want to waste [Ms. Fried's] time on someone that doesn't meet [her] standards," but that perhaps Brown would "present better in person than over the phone." (*Id.*) Finally, Ms.

Mitchell asked whether Ms. Fried could recall any specific details from the phone conversation, so that she can "respond to Brown more succinctly." (*Id.*)
Ms. Fried stated that she did not have anything more to say than that "he was not articulate in [the] phone conversation, but to give Brown the benefit of the doubt and give him a
standard interview and then decide whether to move forward or not." (*Id.*) Ms: Mitchell contacted Brown by e-mail and scheduled a second phone interview. (Paper No. 19 Ex. 9) On April 7, 2005, Ms Mitchell interviewed Brown by phone. Ms. Mitchell took notes during the interview. In her notes, among other things, Ms. Mitchell wrote "good fit [with] our [position] our priorities all his career [sic]," and that Brown did not have much experience with budgets. (Paper No. 21 Ex. 14) On April 19, 2005, Brown sent another e-mail to Ms. Fried. (*Id.*) In the e-mail, he stated, "again my background provides the full experiences, expertise, and trustworthy [sic] stipulated in the requirement of this position," and he confirmed his desire that Marriott
keep his candidacy open and under consideration as they try to fill the position. (*Id.*) In response, Ms. Mitchell informed Brown that his candidacy for the position would not continue any further because he did not meet the qualifications for a manager position at Marriott and he

lacked the financials component in his background. (*Id.*) Brown e-mailed Ms. Mitchell back,
reasserted his qualifications, and stated, "[m]y pursue [sic] of a career with Marriott is because of its great reputation. I hope my continuing pursue [sic] of this position is not causing any undo
[sic] problems." (*Id.*)
On April 19, 2005, Marriott re-posted the position in the Washington Post. (Paper No. 21 Ex. 15) The title of the position was "Production Support Manager." (*Id.*) The qualifications
for the job appeared in a different order than they had in the March 8, 2005 posting but were otherwise the same. On May 5, 2005, the position was put on hold, and Ms. Fried hired Richard

Miller on a contractual basis to fill the position. (Paper No. 19 Ex. 5) Mr. Miller was not hired
full-time because Ms. Fried was not sure that he was a good fit for the position. (*Id.*) On December 5, 2005, Mr. Gaetan Bedard was hired full-time to fill the position.

B. Procedural History

On October 6, 2005, Brown filed a complaint with the Maryland Equal Employment
Opportunity Commission ("EEOC"). (Paper No. 21 Ex. 19) On October 18, 2006, the EEOC

mailed a Dismissal and Notice of Rights letter to Brown. (Paper No. 19 Ex. 12) The letter gave him 90 days from the date he received the letter to file suit. (*Id.*) On December 21, 2006, Brown contacted the EEOC and asked them to reconsider their decision. (Paper No. 21 Ex. 20) On January 16, 2007, Mr. Gerald Kiel of the EEOC declined to reconsider Brown's complaint and stated that a dismissal and notice of rights letter was issued on November 30, 2006, and that Brown had 90 days from receipt of that letter to file suit. (*Id.*) On February 27, 2007, Brown filed suit in the Circuit Court for Montgomery County. On or about May 4, 2007, Brown filed an Amended Complaint; he effected service on Marriott on or about May 15, 2007. (Paper No. 2) The case was removed to this Court on June 14, 2007.

II. Standard of Review

Summary judgment is proper if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986);

Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 302 (4th Cir. 2006). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). A dispute of material fact is only "genuine" if sufficient evidence favoring the

non-moving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S.

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at 248-49. However, the nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). The Court may only rely on facts supported in the record, not simply assertions in the pleadings, in order to fulfill its "affirmative obligation . . . to prevent

'factually unsupported claims or defenses' from proceeding to trial." *Felty v. Grave-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-24). When ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all *justifiable* inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255 (emphasis added).

III. Discussion

A. Timeliness

The EEOC issued Brown a Dismissal and Notice of Rights letter on October 18, 2006.

(Paper No. 19 Ex. 12) The letter gave Mr Brown 90 days from receipt of the Notice to file suit, otherwise his right to sue would be lost. On December 21, 2006, Brown asked the EEOC to

reconsider its decision. In a letter dated, January 16, 2007, Mr. Kiel of the EEOC declined to
reopen Brown' s charge and reiterated that a Notice of Rights was issued on November 30, 2006, and that if Brown wished to file suit, he must do so within 90 days from the date of receipt of the letter. Brown filed his suit in Montgomery County Circuit Court on February 27, 2007.
Marriott argues that Brown' s claim is time barred because it was filed more than four months after the EEOC mailed the Dismissal and Notice of Rights letter. Brown argues that he did not receive the letter until November 30, 2006, and the Court should apply equitable tolling
because Brown relied on Mr. Kiel' s January 16, 2008, that identified November 30, 2006 as the date when the 90-day limitations period began to run.
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The 90-day limitations period to file suit in federal court begins to run after receipt of a final EEOC decision. *See* 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.28(c)(1). A decision on
a request for reconsideration is a final decision and, as such, re-starts the 90 day limitations period to file suit in federal court. *See Hanson-Hodge v. Massanari*, 2002 WL 32361841, at *2

(D. Md. July 23, 2002) (treating denial of request for reconsideration as beginning of 90-day
limitations period for filing). Thus, the 90-day limitations period re-started on January 16, 2007,
the day the EEOC denied Brown's request for reconsideration. Brown filed suit on February 27, 2007 in the Circuit Court for Montgomery County, and thus filed his suit within the 90-day period.

Marriott further argues that Brown's claim is time barred because the February 27, 2007, Complaint was never served on Marriott and it was only after Brown filed an Amended
Complaint on May 8, 2007, over two months later, that he served it on May 15, 2008. Before an action is removed to federal court, state law governs service of process. *See Eccles v. Nat'l Semiconductor Corp.*, 10 F. Supp. 2d 514, 519 (D. Md. 1998). Under Maryland law, a plaintiff has 60 days to effect service of process on a defendant. *See* Md. Rule 2-113. Maryland courts toll the 90-day period for filing under Title VII, once a complaint is filed in state court. *See*
Kramer v. Jotun Paints, Inc., 183 F. Supp. 2d 795, 799 (D. Md. 2002). If a plaintiff allows a summons to expire, the 90 days begins to run again. (*Id.*)

Brown filed his initial complaint in state court on February 27, 2007, 42 days into the 90

day period. Brown's summons expired on April 27, 2007, and thus the 90-day period to file began to run again. Brown filed an Amended Complaint in state court on or about May 4, 2007. By this date, a total of 51 days of the 90-day filing period had elapsed. As Brown was still within the period, his claim is not time barred.
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B. Motion for Summary Judgment

Brown asserts a disparate treatment claim based on Title VII and Section 1981. Because Brown presents no direct evidence of discrimination, his claim is subject to the familiar burden shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Under the *McDonnell Douglas* scheme, a plaintiff must initially establish, by a preponderance of the evidence, a prima facie case of employment discrimination. *See Holland v. Washington Homes, Inc.*, 487 F.3d 208, 214 (4th Cir. 2007). Once the plaintiff has established a prima facie case of discrimination, the defendant may respond by producing evidence that it acted with a legitimate, nondiscriminatory reason. Thereafter, the plaintiff may adduce evidence showing that the defendant's proffered reason was a mere pretext and that race was the real reason for the defendant's less favorable treatment of the plaintiff. *See Hill v. Lockheed Martin Logistics*

Mgmt., Inc., 354 F.3d 277, 284 (4th Cir. 2004). Although the evidentiary burden shifts back and forth under the framework, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

To establish a prima facie case of discrimination, Brown must establish that: (1) he is a member of a protected class; (2) that he applied and was qualified for a job which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; (4) that, after his rejection, the position remained open and the employer continued to seek applications from persons of his qualifications. *McDonnell Douglas*, 411 U.S. at 792-93.

Prima Facie Case

Viewed in the light most favorable to Brown, the facts establish a prima facie case, albeit a weak one. Brown is African-American. Brown's resume and Judith Fried, the hiring

manager's, own words support a finding that he was qualified for the position of COBOL Support Manager. When deposed, Judith Fried stated that "based on [his] resume, I would have

considered this person to be, you know, looked like they have the experience I was looking for."
(Paper No. 21 Ex. 23) Moreover, the qualifications listed on Brown's resume earned him a
telephone interview with Ms. Fried . Despite his apparent qualifications, Brown was rejected by Marriott for the position of COBOL Production Manager. After his rejection, the position remained open and Marriott continued to seek other applicants. Because Brown has established a prima facie case, the burden now shifts to Marriott to "articulate a legitimate, nondiscriminatory reason" for not hiring Brown. *Hill*, 354 F.3d at 285. "[The] burden, however, is a burden of production, not persuasion." *Holland*, 487 F.3d at 214.
Marriott maintains that its decision not to hire Brown was based on Brown's telephone screening with Ms. Fried. From the telephone screening, Ms Fried discovered things that were not apparent on Brown's resume. First, Ms Fried discovered that Brown's management experience was limited and that Brown did not understand the requirements of a COBOL Production Support Manager. Marriott supports this assertion with information derived from Brown's deposition. During his deposition, Brown admitted that he thought the job would require him to "manage the system and support the system." (Paper No. 22 Ex. E) During the

phone interview, Ms. Fried informed Brown that the "job was not fixing the problem." (*Id.*) When pressed to explain how he interpreted Ms. Fried' s comment, Brown stated, "I don' t know, there might have been some other problems I had to fix . . . I don' t know what the job is." (*Id.*)

Marriott asserts that the position was not a technical one, but rather a managerial position. Second, Marriott states that Brown did not demonstrate good communication skills. In particular, Marriott contends that Brown did not answer the questions directly, did not use

complete sentences, provided illogical answer, and seemed to talk around things. Marriott avers that this was the basis for the decision not to hire Brown. Marriott' s assertions are supported by

the e-mail communication between Ms. Fried and Ms. Mitchell. In the e-mail chain dated April 5, 2005, Ms Mitchell stated that she wanted to give Brown the benefit of the doubt. (Paper No. 21 Ex. 11) Ms. Mitchell said to Ms. Fried, "I was suggesting that he might present better in person than over the phone. . . . I do not want to waste your time on someone that doesn' t meet your standards." (*Id.*) Given Mr. Brown' s persistent e-mails, Ms. Mitchell also asked Ms. Fried

if she was "able to recall some details from [the] phone conversation, [so that she could] respond to [Brown] more succinctly." (*Id.*) In response, Ms. Fried stated, "I don't have anything more to say than he was not articulate in our phone conversation . . . ." (*Id.*) Finally, the grammatical and spelling errors in Brown's e-mail further evince and support Marriott's claim that Brown did not possess the communication skills necessary for the position. (Paper No. 19 Ex. 8) The Court finds that Marriott has advanced a legitimate, nondiscriminatory reason for not hiring Brown and thus has sustained their burden.

Brown counters and insists that the Court should find the proffered reasons are a pretext because Marriott changed its reason for not hiring Brown on more than one occasion, and inconsistent reasons for not hiring support a finding of pretext. First, Brown argues that during the phone interview, Fried "logically [deduced] that Brown was African-American when Brown informed her that he was part of the minority business enterprise. . . ." Then, Brown states that

"Fried deliberately misinformed Brown about the position responsibilities to brush off [Brown]." Third, Brown points to Ms. Mitchell's e-mail of April 19, 2008, stating that Brown was missing

the financials component as "yet another ambiguous and inconsistent reason." The Court is unpersuaded by this argument because it is based on unjustified inferences and unfounded

conclusions. There is no evidence before the Court about what Ms. Fried logically deduced or that she deliberately misinformed Brown. Although, Brown may not have been told flat out that his managerial and communication skills were the weak link in his application, the Court finds that the facts support that these were the reasons that Marriott did not hire Brown. From day one, the e-mail communication within Marriott was consistent. The reason Marriott gave Brown for its decision is not inconsistent with internal discussion. The notes taken by Ms. Mitchell during her interview of Brown support this finding. Marriott ultimately had several reasons why Brown was not qualified, however they communicated the most palpable reason, and the Court can understand why Ms. Mitchell was hesitant to tell Brown the complete truth. It is indeed a difficult and hurtful task to tell someone that their language and communication skills are the reason they do not qualify for a position. It is clear to the Court, however, that discretion and compassion, and not any

illegitimate reasons, were fundamental to Marriott' s, and in particular Ms. Mitchell' s, approach
to dealing with Brown.
/s/
Alexander Williams, Jr.
United States District Court Judge
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